Supreme Court, U.S.
FILED
DEC 15 1993
OFFICE OF THE CLERK

93-967
No.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1993

ZAPATA GULF MARINE CORPORATION,
Petitioner,
vs.
BETTY U. CHIASSON,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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57 pp

QUESTIONS PRESENTED

1. Does Federal Rule of Civil Procedure 26(b)(1) mandate disclosure and pretrial discovery of all surveillance evidence notwithstanding the work product doctrine of Rule 26(b)(3) and a district court's local rule and standing order protecting the disclosure and/or discovery of impeachment evidence?

2. If the work product doctrine of Rule 26(b)(3), local rules, and standing orders protect surveillance impeachment evidence from pretrial disclosure, may disclosure of surveillance which is both substantive and impeachment evidence also be protected?

3. Did the Fifth Circuit Court of Appeals err in remanding this matter for a new trial because it concluded that the district court's admission of a surveillance videotape of the plaintiff/respondent which was not disclosed by defendant/petitioner before trial was reversible error?

LIST OF PARTIES

The following are parties who have a real or potential interest in the outcome of this case:

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3. Betty U. Chiasson
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1. Zapata Gulf Marine Corporation is a subsidiary of Tidewater Inc., 1440 Canal Street, New Orleans, Louisiana 70112, which has no subsidiaries other than wholly-owned subsidiaries.

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ZAPATA GULF MARINE CORPORATION,

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BETTY U. CHIASSON,

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Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Zapata Gulf Marine Corporation, hereby petitions for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Minute Entry of the District Court denying the respondent's Motion for a New Trial is unreported. The case number in the Eastern District for the State of Louisiana is 90-1801. It is reprinted in Appendix A, *infra*, p. 1a. The opinion of the Court of Appeals, *Chiasson v. Zapata Gulf Marine Corp.*, is reported at 988 F.2d 513 (5th Cir. 1993). (App. B, *infra*, pp. 2a-17a.) The denial of a timely-filed Petition for Rehearing and Suggestion for Rehearing *En Banc* is reported at 3 F.3d 123 (5th Cir. 1993). (App. C, *infra*, pp. 18a -19a.)

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals was entered on March 31, 1993. On September 17, 1993, the Court of Appeals denied petitioner's timely-filed Petition for Rehearing and Suggestion for Rehearing *En Banc*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS, RULES AND ORDERS INVOLVED

The statutory provisions, rules, and standing order involved are set forth in Appendix E (beginning at p. 22a.) They are:

Federal Rule of Civil Procedure 26

Federal Rule of Civil Procedure 83

Uniform District Court Rule 9

Federal Eastern District of Louisiana
Pretrial Notice, ¶ 10.b

STATEMENT OF THE CASE

Respondent, Betty U. Chiasson, was employed by petitioner, Zapata Gulf Marine Corporation, as a cook aboard petitioner's offshore supply vessel. As a result of an alleged unwitnessed accident aboard the vessel, respondent sued petitioner under the Jones Act, 46 U.S.C. § 688, and General Maritime Law, claiming negligence of the petitioner and the unseaworthiness of the vessel.

During discovery, respondent propounded an interrogatory to petitioner in which she asked whether

petitioner had "any still or motion pictures taken of [respondent] either before, on, or after the date of the occurrence in this cause of action." Petitioner objected to this interrogatory on the basis of the "attorney work-product privilege" but responded that at that time it did not have any such pictures. Subsequent to this response, petitioner did obtain videotape surveillance of the respondent although petitioner's discovery response to respondent was not supplemented before trial for the reasons stated hereafter.

In accordance with the Eastern District of Louisiana Uniform Local Court Rule 9 (App. E, *infra*, p. 31a), and the Federal Eastern District of Louisiana Pretrial Notice, ¶10.b (App. E, *infra*, p. 32a), petitioner requested an *ex parte* review of the videotape in issue by the District Court to obtain a ruling as to whether the exhibit had to be disclosed to respondent. The videotape of the surveillance of the respondent clearly impeached her pre-trial testimony and revealed for the first time the truth about her alleged injuries.

The surveillance videotape showed the respondent performing various routine daily activities, such as sweeping the garage, buying groceries, and retrieving mail from the mailbox, which were clearly the types of activities the respondent had denied she was able to perform. Moreover, the videotape showed the respondent crawling under a car to tape a muffler, hardly a routine daily activity. All of the foregoing clearly contradicted the respondent's trial testimony where she claimed that she was in need of neck surgery.

Based on its observations of the videotape, the District Court concluded the surveillance evidence obtained by petitioner clearly constituted impeachment evidence which was protected from disclosure and/or discovery.

On the first day of trial, respondent moved *in limine* to exclude any surveillance evidence. The District Court denied this motion and allowed petitioner to introduce the surveillance videotape into evidence and to show it to the jury. The District Court also denied respondent's request to review the videotape prior to showing it to the jury.

The sole purpose for which petitioner introduced this videotape into evidence at trial was to impeach the respondent's credibility which was clearly at issue. What was depicted on the videotape should not have been a surprise to the respondent since it was clearly she in the video, and she more than anyone would be aware of her own activities.

The jury returned a verdict for respondent on her negligence claim, but found her contributorily negligent and 90% at fault for the accident. (App. D, *infra*, pp. 20a-21a.)

Respondent filed a Motion for New Trial which was denied by the District Court (App. A, *infra*, p. 1a). Respondent appealed to the Fifth Circuit Court of Appeals which vacated the judgment below and remanded the matter for a new trial. (App. B, *infra*, pp. 2a-17a.) Petitioner then timely filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* to the Fifth Circuit Court of Appeals. This Petition was denied on September 17, 1993. (App. C, *infra*, pp. 18a-19a.)

REASONS FOR GRANTING THE WRIT

This is a matter of first impression for this Honorable Court, and this Petition should be granted: (1) to promulgate guidelines for lower courts to assure the co-existence of proper discovery with the orderly presentation of truthful testimony, without granting a civil litigant license to lie with impunity by virtue of advance knowledge of contradictory evidence in the possession of the opposing litigant; (2) to resolve conflicts among the federal district courts on the important question of federal law as to whether Federal Rule of Civil Procedure 26(b)(1) mandates the pretrial disclosure and discovery of surveillance evidence; (3) to present guidelines for the federal district and appellate courts as to the scope of discovery of surveillance evidence under Federal Rule of Civil Procedure 26 and to resolve whether and by what means such scope can be narrowed by a district court's local rules and standing orders; (4) to determine whether Federal Rule of Civil Procedure 26(b)(3) protects from disclosure surveillance evidence obtained by an adverse party; and (5) to determine whether the decision of the Fifth

Circuit Court of Appeals, which significantly undermines a District Court's discretion to protect impeachment evidence from pretrial disclosure and/or discovery, establishes a precedent-setting error.

I.

The Fifth Circuit Court of Appeals has Raised but not Decided Important Questions of Federal Procedural Law Which have not Been, but Should be, Settled by this Court.

The Court below held that a surveillance videotape of the respondent should have been disclosed by petitioner during discovery because it was not used **solely** for impeachment but was in part substantive. In so holding, the Fifth Circuit Court of Appeals raised, but did not decide, the broader issues involved here. These are: (1) whether the non-disclosure procedure provided by the District Court's Local Rules and Standing Orders is inconsistent with Federal Rule of Civil Procedure 26(b)(1) and precluded under Rule 83; (2) whether, by requiring the opposing party to disclose contradictory evidence in advance of trial, the orderly presentation of truthful testimony is frustrated; and

(3) whether surveillance impeachment evidence is protected from discovery by Rule 26(b)(3).

Neither this Court nor any federal appellate court has directly confronted these important issues. Most significantly, this Court has never promulgated guidelines for the lower courts faced every day with these questions to assure that civil litigants are not granted carte blanche license to deceive the finder of fact with impunity because they have been provided with advance knowledge of contradictory evidence in the possession of the opposing litigant. Additionally, the district courts which have been confronted with the question of the discoverability of surveillance evidence in particular have reached conflicting conclusions on this issue.

Some courts protect surveillance evidence from disclosure to preserve the effective use of such evidence and to assure that the truthfulness of a witness' testimony be established. *Hikel v. Abousy*, 41 F.R.D. 152 (D.Md. 1966); *MacIvor v. Southern Pacific Transp. Co.*, No. 87-6424-E, 1988 WL 156743 (D.Or. June 9, 1988); *Bogatay v. Montour R.R.*

Co., 177 F. Supp. 269 (W.D.Pa. 1959); *Andras v. Pontchartrain Materials, Inc.*, No. 88-0451, 1990 WL 19817 (E.D.La. Feb. 23, 1990); *Wainwright v. Dawn Services, Inc.*, No. 89-2032, 1991 WL 197113 (E.D.La. Sept. 11, 1991).[2]

Other courts provide limited protection only, by requiring disclosure only after the deposition of the party seeking disclosure has been taken. *Di Giacoobe v. National R.R. Passenger Corp.*, No. 86-534, 1987 WL 11227 (E.D.Pa. May 21, 1987); *Boyle v. CSX Transp., Inc.*, 142 F.R.D. 435 (S.D.W.Va. 1992).

However, other courts require that surveillance evidence be disclosed in discovery, relying on the policy of broad discovery evidenced in the federal civil rules and the need of the party seeking the disclosure of such evidence to

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2. *See generally* Annotation, *Discovery, in Civil Case, of Material Which is or May Be Designed for Use in Impeachment*, 18 A.L.R.3d 922 (1968 & Supp. 1993);

Annotation, *Photographs of Civil Litigant Realized by Opponent's Surveillance as Subject to Pretrial Discovery*, 19 A.L.R.4th 1236 (1983 & Supp. 1993);

8 Wright & Miller, Federal Practice & Procedure: Civil, § 2015 (1970 & Supp. 193).

evaluate its authenticity. *Daniels v. National R.R. Passenger Corp.*, 110 F.R.D. 160 (S.D.N.Y. 1986); *Snead v. American Export-Isbrandtsen Lines, Inc.*, 59 F.R.D. 148 (E.D.Pa. 1973); *Martin v. Long Island R.R. Co.*, 63 F.R.D. 53 (E.D.N.Y. 1974); *Blyther v. Northern Lines, Inc.*, 61 F.R.D. 610 (E.D.Pa. 1973); *Romero v. Chiles Offshore Corp.*, 140 F.R.D. 336 (W.D.La. 1992).

In holding that the videotape at issue in this case should have been disclosed in discovery, the Fifth Circuit Court of Appeals did not address the real issue which should be decided by this Court for the guidance of the federal bench - does Federal Rule of Civil Procedure 26(b)(1) mandate that all surveillance evidence, whether solely impeachment, substantive, or a combination of both, be disclosed, or is such evidence protected by the work-product doctrine of Rule 26(b)(3) and/or the district courts' power to narrow the scope of such discovery in accordance with Rule 83 and Local Rules and Orders?

Federal Rule of Civil Procedure 26(b)(3) provides certain restrictions upon the discovery of otherwise

discoverable evidence under Rule 26(b)(1). Surveillance evidence is normally acquired in civil litigation by an adverse party not simply in anticipation of litigation, but after suit has actually been filed. This evidence, then, should fall within the "factual work product" protection of Rule 26(b)(3). In accordance with that Rule, this material should be discoverable only upon proof of "substantial need" and upon proof that the party seeking the discovery cannot obtain the "substantial equivalent" of these materials by other means without undue hardship. Unless protected by Rule 26(b)(3), surveillance evidence will only provide the adverse party with knowledge of the other party's case and will destroy the threat of the use of this evidence as impeachment evidence which acts as an important safeguard for realistic, truthful testimony.

At issue here is whether a plaintiff in a personal injury case can lie under oath with impunity because the courts have effectively prevented a defendant from revealing the truth to the finder of fact, as the plaintiff is permitted to discover surveillance material and harmonize it with his

conflicting testimony. Because of the current state of video technology and the increasing use of surveillance in civil litigation, this serious legal issue should be resolved by this Court. Certiorari should be granted for this purpose as well as to establish uniform procedural guidelines for the federal district and appellate courts to follow.

If this Court does not resolve the conflict among the lower courts of the circuits as to the discoverability of surveillance evidence, civil litigants will be subjected to inconsistent rulings in the various courts concerning the federal rules governing discovery. The preservation of the integrity of the judicial process requires this Court to decide this issue.

II.

The Decision Below Significantly Undermines a District Court's Discretion in Protecting Impeachment Evidence from Pretrial Disclosure and/or Discovery.

In accordance with the Eastern District Court's Uniform Local Rule 9 (App. E, *infra*, p. 31a) and Pretrial Notice, ¶10.b (App. E, *infra*, p. 32a), the trial judge, at

petitioner's request, conducted an *ex parte* review of the videotape in issue, concluding it was the sort of evidence considered by the court's local rule and Federal Rules of Evidence to be clearly impeachment evidence and thus protected from disclosure. On this basis, the court allowed the tape to be shown to the jury after respondent had testified, without first producing it to respondent.

On appeal, the Fifth Circuit expressed the opinion that "the tape is, at the very least in part substantive," and should have been disclosed prior to trial, "**regardless of its impeachment value**." 988 F.2d at 517-518 (emphasis added). It thus concluded that "[t]he District Court abused its discretion by allowing non-disclosure and admitting the tape into evidence." *Id.* at 518. If this erroneous holding is allowed to stand, it will establish a precedent which will be interpreted by the federal bench and civil litigants as requiring pretrial disclosure of all surveillance evidence.

Although the opinion below discusses the general meaning of impeachment and substantive evidence, it does not present a workable rule for courts and litigants

confronted with surveillance evidence which has both substantive value and impeachment value. Neither does it resolve whether such evidence must always be disclosed in pretrial discovery. This is particularly so where the proponent of the evidence offers such for impeachment only, and the trial judge after inspection agrees with the proponent of the evidence.

Every video of a litigant engaging in activities which he or she says are no longer possible or are not possible without some hindrance or pain will be in part substantive evidence. Should this, then, always be discoverable? Should the plaintiff in civil litigation have the right to know before trial that he or she has been caught lying? Clearly, that result would undermine this country's truth-seeking system of justice and a sense of what is right and wrong.

If the Fifth Circuit is correct that the Federal Rules of Civil Procedure require pre-trial disclosure of surveillance which is both substantive and impeaching, a district court's discretion in protecting impeachment evidence from disclosure following *in camera* review will be rendered

meaningless. Furthermore, the protection of Rule 26(b)(3) and the Uniform Local Rules and Standing Orders of a district court will have no practical effect whatsoever, as is evidenced in the case at bar.

It is thus important for this Court to provide direction to the lower courts regarding the scope of discovery of impeachment evidence, whether it be surveillance, prior accidents or undisclosed medical conditions, and to exercise its supervisory powers to decide the issue left unresolved by the Fifth Circuit. This Court's guidance is needed as to whether a non-disclosure procedure, excluding from discovery a category of relevant, otherwise discoverable evidence, is viable under the Federal Rules of Civil Procedure and if so, what discretion is afforded to the trial courts in establishing and enforcing a non-disclosure policy.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

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APPENDIX A -- MINUTE ENTRY OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA FILED AUGUST 27, 1991

MINUTE ENTRY
BEER, J.
AUGUST 21, 1991

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

BETTY U. CHIASSON	CIVIL ACTION
VERSUS	NO. 90-1801
ZAPATA GULF MARINE CORP.	SECTION M

Plaintiff's Motion for a New Trial was heard on August 21, 1991. Having reviewed the memoranda submitted by counsel and the relevant law, the court concludes that the verdict was not against the great weight of the evidence. Accordingly, plaintiff's Motion for a New Trial is DENIED.

/s/ Peter Beer
Peter Beer
United States District Judge

APPENDIX B -- OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED MARCH 31, 1993, REPORTED AT 988 F.2D 513

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 91-3766

BETTY U. CHIASSON,

Plaintiff-Appellant,

VERSUS

ZAPATA GULF MARINE CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana

Before JONES and BARKSDALE, Circuit Judges, and JUSTICE[1], District Judge.

BARKSDALE, Circuit Judge:

Concerning reversible error *vel non* in the admission of a surveillance videotape, at issue is a district court rule

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1. District Judge for the Eastern District of Texas, sitting by designation.

allowing non-disclosure of evidence to be used solely for impeachment, if approved through an *in camera* proceeding (non-disclosure procedure). Because we find that the tape was relevant to substantive issues, as well as possibly serving to impeach, we need not determine whether the non-disclosure procedure is inconsistent with Federal Rule of Civil Procedure 26(b)(1). Finding reversible error, we **VACATE** and **REMAND** for a new trial.

I.

Betty Chiasson, an employee of Zapata Gulf Marine Corporation, sued her employer under the Jones Act, claiming negligence and unseaworthiness of the vessel on which she served. Chiasson alleged that, while attempting to board the vessel, she suffered permanent injuries from an unwitnessed accident.

By interrogatory during discovery, Chiasson asked Zapata whether it had "any still or motion pictures taken of [Chiasson] either before, on, or after the date of the occurrence in this cause of action". In response, Zapata objected on the basis of the "attorney work-product *privilege*"

(emphasis added),[2] but nonetheless answered that it did not have any. However, surveillance that produced such pictures began less than two months after the response, which was never supplemented.[3]

On the first day of trial, Chiasson moved *in limine* to exclude any surveillance evidence, on the basis of the negative interrogatory answer. The court did not then rule, stating instead that, when the issue arose, it would be handled in accordance with the Federal Rules of Evidence and the relevant local rules. At the end of the next day, the

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2. The work product doctrine, first articulated by the Supreme Court in *Hickman v. Taylor*, 329 U.S. 495 (1947), was codified in 1970 as Federal Rule of Civil Procedure 26(b)(3). The rule provides that attorney work product is discoverable "only upon a showing [of] substantial need . . . and [inability to obtain the substantial equivalent] without undue hardship." This doctrine creates a form of qualified immunity from discovery for such materials, *see, e.g.*, Elizabeth Thomburg, *Rethinking Work Product*, 77 Va.L.Rev. 1515, 1519 (1992), but does not label them "privileged" and, thus, outside the scope of discovery under Rule 26(b)(1).

3. Of course, there is a duty to seasonably supplement "if the party obtains information upon the basis of which . . . the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment." Fed. R. Civ. P. 26(e)(2). Zapata apparently believed that the pretrial notice in issue, discussed *infra*, allowed non-disclosure and therefore, the failure to supplement did not constitute a "knowing concealment".

court ruled that Zapata would be allowed to show a surveillance videotape to the jury; and Chiasson's request to review it in advance was denied.[4] The following morning, after Chiasson's continuing objection was noted, the tape was played. It showed Mrs. Chiasson's activities on four separate dates: sweeping the carport, working under a car, entering a store, and buying food.

The jury found that the vessel was seaworthy, but returned a verdict for Chiasson on her negligence claim. It attributed only 10% of the fault to Zapata, however, finding Chiasson contributorily negligent and 90% responsible for the accident. Chiasson's motion for new trial, based in part on the admission of the film, was denied.

II.

Chiasson contends that the admission of the surveillance film was reversible error, asserting that it was of

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4. The private investigator who conducted the surveillance testified that he (or members of his firm) observed Chiasson over a nine-month period, for a total of 129 hours. Approximately four hours of activity were taped. From that, a 27-minute tape was prepared for trial. Chiasson was not given an opportunity to view the entire four hours and select additional portions to be shown.

a substantive, as well as an impeachment, nature, and, alternatively, that, even if only the latter, the non-disclosure procedure violates the Federal Rules of Civil Procedure. We review for abuse of discretion both the admission of the film and the denial of a new trial. *Dixon v. International Harvester Co.*, 754 F.2d 573 (5th Cir. 1985).

Federal Rule of Civil Procedure 26 addresses the broad boundaries of discovery.

> Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) ***In General***. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

Fed. R. Civ. P. 26(b)(1). This general rule, and the specific provisions that follow, have been described as "one of the most significant innovations" of the federal rules. *Hickman*

v. Taylor, 329 U.S. 495, 500 (1947). The discovery rules serve to "narrow and clarify the basic issues between the parties" and function as a vehicle for locating the sources of relevant facts and eventually, ascertaining those facts. Because of these tools, "civil trials in the federal courts no longer need be carried on in the dark". *Id.* at 501.

The federal civil rules generally govern discovery; but the district courts' power to control it is evidenced by Rule 26(c), allowing protective orders to limit or compel discovery. In addition, Rule 83 establishes the procedure for enactment of local rules "not inconsistent with these rules" and further allows district courts to regulate practice before them "in any manner not inconsistent with these rules" or the local rules of the district in which they sit.

This action involves both a local rule and, more directly, a standing order for practice in the Eastern District of Louisiana. Local Rule 9, applicable in the Eastern, Middle and Western Districts of Louisiana, provides that no party to pending litigation may confer with a judge unless notice is first given to the opposing party. This rule, however, does not

apply to "applications normally considered and acted upon *ex parte*". Unif. Dist. Ct. R. 9.

Ex parte review of the videotape in issue falls within the exception to Rule 9, as a result of the Eastern District's Pre-Trial Notice, which guides preparation of the pretrial order. *See Andras v. Pontchartrain Materials, Inc.*, 1990 WL 19817 (E.D.La. 1990). The Notice requires each party to list the exhibits to be presented at trial. However, "[i]f a party considers he has good cause not to disclose exhibits to be used *solely for the purpose of impeachment*, he may ex parte request a conference with the Court and make his position known to the court in camera". Pre-Trial Notice, IX., ¶10.b. (emphasis added). This is the non-disclosure procedure referred to at trial, when the court stated that "defense counsel in accordance with the Local Rule . . . did the necessary paperwork to have an in camera review of certain videotapes . . . [and] the Court perceived that it was the sort of evidence that is considered by the Rule as far as permitting counsel to hold it out of the notice of witnesses who would be testifying". Implicitly, then, the district court had found the

videotape to be solely for impeachment and, as such, immune, *inter alia*, from discovery.

The non-disclosure procedure, excluding from discovery in all cases a category of relevant, otherwise discoverable[5] evidence may well be inconsistent with the Federal Rules of Civil Procedure and precluded under Rule 83.[6] As stated, because the tape is also relevant to substantive issues, and should have been disclosed on that basis, we need not reach this broader, and most troubling, issue. However, as a backdrop to our finding the tape admissible because of its substantive nature, we first review the law on non-disclosure of impeachment evidence.

There are surprisingly few cases on the discoverability of impeachment evidence; and, until now, apparently none in

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5. As noted, as part of its response to Chiasson's interrogatory, Zapata claimed that any surveillance material need not be disclosed, because it was protected attorney-work product. *See* Rule 26(b)(3). That claim is not made here.

6. We recognize, of course, that Rule 26(c) allows the scope of discovery to be limited upon a showing of good cause.

the federal arena have reached the appellate level.[7] Those courts requiring that such evidence be disclosed in discovery cite, primarily, the policy of broad discovery, *see, e.g. Daniels v. National R.R. Passenger Corp.*, 110 F.R.D. 160 (S.D.N.Y. 1986), the need of the party seeking disclosure to evaluate the authenticity of such evidence (particularly when, as here, the impeachment evidence is in the form of photographs or videotape), *see, e.g., Snead v. American Export-Isbrandtsen Lines, Inc.*, 59 F.R.D. 148 (E.D. Pa. 1973), and the reality that revealing all evidence will probably promote settlement.[8]

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7. This court, however, was presented with a closely analogous situation in *Morgan v. Commercial Union Assurance Cos.*, 606 F.2d 554 (5th Cir. 1979), which involved an award of damages for back injuries allegedly sustained in an accident. At trial, the plaintiff testified that he had never experienced back trouble before the accident. The defendant sought to introduce the testimony of a doctor who had treated the plaintiff for a back disorder before the accident, but the testimony was excluded because it had not been disclosed before trial.

8. The defendant asserted disclosure was not required, because the pretrial order called only for identification of potential witnesses other than "rebuttal witnesses". We affirmed, holding that the doctor was not a "rebuttal witness", and noting that "a defense witness whose purpose is to contradict an expected and anticipated portion of the plaintiff's case in chief can never be considered a 'rebuttal witness,' or anything analogous to one". *Id.* at 556.

(footnote continued on next page)

See, e.g., Martin v. Long Island R.R. Co., 63 F.R.D. 53 (E.D.N.Y. 1974).

Courts protecting impeachment evidence from disclosure have done so because "[t]he only practical way to preserve the prophylactic effect of impeachment evidence . . . is to keep its existence as well as its contents unknown". *MacIvor v. Southern Pacific Transp. Co.*, No. 87-6424-E, 1988 WL 156743, *2 (D. Or. June 9, 1988). Others, however, have countered this potential problem by requiring that the party to be impeached commit to his

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(footnote continued from previous page)

We acknowledge that *Morgan*, like this case, might sometimes yield questionable results: "Our discovery and disclosure laws and rules, designed to end trial by ambush, do provide hiding places for modern 'bushwackers.' They are, however, the law." *Id.* at 556.

Courts allowing discovery of impeachment evidence have done so in varying degrees. Some have held that both the existence and the substance of impeachment evidence are, in all instances, discoverable, *e.g. Daniels*, 110 F.R.D. 160; others have held that while the existence of such evidence is discoverable, the substance need be disclosed only if it will be used at trial, *e.g., DiGiacobbe v. National R.R. Passenger Corp.*, No. 86-534, 1987 WL 11227 (E.D. Pa. May 21, 1987); *Dodson v. Persell*, 390 So. 2d 704 (Fla. 1980)

position through deposition before the impeachment evidence must be produced. *E.g., Martin*, 63 F.R.D. 53; *Blyther v. Northern Lines, Inc.*, 61 F.R.D. 610 (E.D. Pa. 1973).

In the context of a defendant's surveillance of a personal injury plaintiff, the argument for non-disclosure is that the plaintiff seeks the disclosure of such evidence only when it will probably show that the injury is fabricated or exaggerated. In those cases, it has been said that the potential perjurer has "no cause to complain of surprise if defendants elect to disprove the case on trial instead of in the conference room". *Hikel v. Abousy*, 41 F.R.D. 152, 154 n.1 (D. Md. 1966), citing *Thorne v. Good Humor Ice Cream Co.*, Daily Record (Sup. Ct. of Baltimore, March 26, 1964). Although that argument has a certain logical appeal, we must recognize that it "proceeds on the premise that . . . witnesses whose testimony is designed to impeach invariably have a monopoly on virtue and that evidence to which the attempted impeachment is directed is, without exception, fraudulent." *Boldt v. Sanders*, 111 N.W. 2d 225, 227 (Minn. 1961).

That premise may well be a faulty one, because it flies directly in the face of the very purpose of discovery. The federal rules promote broad discovery so that all relevant evidence is disclosed as early as possible, making a trial "less a game of blind man's b[l]uff and more a fair contest," *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 683 (1958), where each party can knowledgeably evaluate the strength of its evidence and chances of ultimate success.

Furthermore, we note that most of the cases prohibiting discovery of impeachment evidence rely on local rules similar to the pretrial notice at issue here. *See Bogatay v. Montour R.R. Co.*, 177 F. Supp. 269 (W.D. Pa. 1959). One commentator has opined that "[t]o the extent that [Bogatay] relied on a local rule it is unsound. It is wholly clear that the scope of discovery provided by the Civil Rules cannot be narrowed by local rule." 8 Wright & Miller, Federal Practice and Procedure: Civil § 2015 n.45 (1970).

As stated, we need not determine the validity of the Pre-Trial Notice, however, because we conclude that the videotape does not fall within its purview. Even if the

non-disclosure procedure is ultimately held consistent with Fed. R. Civ. P. 26(b), the district court abused its discretion in concluding that the tape was solely for impeachment, rather than being substantive evidence, at least in part.

Substantive evidence is that which is offered to establish the truth of the matter to be determined by the trier of fact. *See,* John P. Frank, *Pretrial Conferences and Discovery -- Disclosure or Surprise?,* 1965 Ins. Law. J. 661, 664 (1965). Chiasson claims that she has suffered "great physical and mental pain and anguish" and seeks damages for "loss of enjoyment from the activities of her normal life." Certainly, then, the severity of her pain and the extent to which she has lost the enjoyment of normal activity are among the key issues a jury must decide in calculating her damages. Evidence which would tend to prove or disprove such losses must be considered "substantive". *Accord, Crist v. Goody,* 507 P.2d 478 (Colo. App. 1972); *Zimmerman v. Superior Court,* 402 P.2d 212 (Ariz. 1965) (en banc).

Impeachment evidence, on the other hand, is that which is offered to "discredit a witness . . . to reduce the

effectiveness of [her] testimony by bringing forth evidence which explains why the jury should not put faith in [her] or [her] testimony." Frank, *supra*, at 664. Chiasson testified at trial that her injuries have interfered with her daily activities because she "can't do anything for too long of a period of time. If [she does], then it starts acting up." She reiterated that activity "starts to aggravate [her] problem." Zapata contends that the videotape of Chiasson shopping and working under her car contradicts these statements and, therefore, discredits her testimony. As such, it labels the tape impeachment evidence.

Having reviewed the videotape, as well as Chiasson's testimony, we are not convinced that the former makes the latter less believable. Chiasson testified only that she is unable to carry on daily activities without pain, not that she is entirely unable to do so. The tape shows her carrying on daily activities. It was taken at some distance and has no sound component. It requires quite a leap to conclude that because she engages in routine activities, *ergo*, she does so without pain. In short, we question whether the proffered

videotape discredits her testimony at all. Assuming, however, that the tape is of some impeachment value, it is also of a substantive nature. Because the tape is, at the very least in part substantive, it should have been disclosed prior to trial, regardless of its impeachment value. The district court abused its discretion by allowing non-disclosure and admitting the tape into evidence.

Zapata contends that admission of the tape, if erroneous, was harmless. *See* Fed. R. Evid. 103 (not reversible error unless substantial right affected). We disagree. Its importance is obvious.[9] Moreover, at oral argument here, both sides conceded that the case would, in all probability, have settled if Chiasson had known about the

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9. Indeed, Zapata conceded the tape's importance at oral argument:

> We thought that if we would show the videotape to the jury without disclosure to the other side, it would have much greater impact on any verdict and it came out as we thought it would -- we had a real low judgment against us.

video. Any error having such a fundamental effect on the outcome of the litigation cannot be considered harmless.[10]

III.

Accordingly, the judgment is **VACATED** and the case is **REMANDED** for a new trial.

VACATED and **REMANDED**.

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10. This is further evidence of the Pre-Trial Notice's possible inconsistency with the Federal Rules of Civil Procedure. Rule 1 states that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action". Fed. R. Civ. P. 1. If disclosure would have prompted settlement, then the non-disclosure procedure seems to thwart the policy articulated in Rule 1.

APPENDIX C -- DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED SEPTEMBER 17, 1993, REPORTED AT 3 F.3D 123

BETTY U. CHIASSON, Plaintiff-Appellant,

v.

ZAPATA GULF MARINE CORPORATION, Defendant-Appellee.

No. 91-3766

UNITED STATES COURT OF APPEALS,

FIFTH CIRCUIT.

September 17, 1993

William Walsh Miles, Lymann, O'Hara & Miles, New Orleans, LA, for plaintiff-appellant.

Carolina Maria Broers, Richard M. Simses, Abbott, Best & Meeks, New Orleans, LA, for defendant-appellee.

Appeals from the United States District Court for the Eastern District of Louisiana.

Appendix C

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 03/31/93, 5 Cir., 1993, 988 F.2d 513)

Before JONES, and BARKSDALE, Circuit Judges, and JUSTICE*, District Judge.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing *en banc*, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing *En Banc* is DENIED. Petitioner and amici read our opinion too broadly. We simply hold that the surveillance evidence should have been disclosed during discovery because it was not used solely for impeachment as the local rule requires. The impeaching value of the evidence was minimal, whereas the evidence was probative on a central substantive issue in the case---plaintiff's physical condition.

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* District Judge of the Eastern District of Texas, sitting by designation.

APPENDIX D -- JURY INTERROGATORIES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA FILED JULY 17, 1991

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

BETTY U. CHIASSON	CIVIL ACTION
VERSUS	NO. 90-1801
ZAPATA GULF MARINE CORPORATION	SECTION M

JURY INTERROGATORIES

Please answer the following questions.

1. Was Zapata Gulf Marine Corp negligent under the Jones Act and was that negligence a legal cause of Betty Chiasson's injury?

X Yes ____ No

2. Was the M/V CHESAPEAKE SEAHORSE unseaworthy and was the unseaworthy condition a legal cause of plaintiff's injuries?

____ Yes X No

3. Was Ms. Chiasson contributorily negligent and was that negligence a proximate cause of her own injury?

X Yes ____ No

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4. If you answered "yes" to question 3, fill in the blanks attributing fault to each party.

10 % Zapata Gulf Marine Corp.

90 % Betty Chiasson
100 %

5. What amount of damages, if any, will fairly and adequately compensate Ms. Chiasson? This is a total amount. Do not make any reduction in the amount of damages based on any percentages of negligence which you may have listed in question 4.

$44,250

Please sign and date the verdict form and return to the courtroom.

New Orleans, Louisiana, this 17th day of July, 1991.

/s/ Barbara Farkas
Foreperson

APPENDIX E --STATUTORY PROVISIONS, RULES, AND STANDING ORDERS

1. Federal Rules of Civil Procedure

RULE 26. General Provisions Governing Discovery

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) ***In General.*** Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location

of any books, documents, or other tangible things and the identify and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

Appendix E

* * *

(3) ***Trial Preparation: Materials.*** Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter

previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

* * *

(c) **Protective Orders.** Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from

annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit

discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

* * *

(e) **Supplementation of Responses.** A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement the response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the person's testimony.

(2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response though correct when made is no longer true and the circumstances

are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the new parties, or at any time prior to trial through new requests for supplementation of prior responses.

(f) **Discovery Conference.** At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

(1) A statement of the issues as they then appear;

(2) A proposed plan and schedule of discovery;

(3) Any limitations proposed to be placed on discovery;

(4) Any other proposed orders with respect to discovery; and

(5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the

motion. Each party and each party's attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Rule 16.

* * *

Appendix E

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980; Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987.)

2. **Federal Rules of Civil Procedure**

RULE 83. Rules By District Courts

Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules. A local rule so adopted shall take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the judicial council and the Administrative Office of the United States Courts and may be made available to the public. In all cases

not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.

(As amended Apr. 29, 1985, eff. Aug. 1, 1985.)

3. **Uniform District Court Rules**

RULE 9. Conference in Chambers - Notice

Except as to applications normally considered and acted upon ex parte, before any attorney or party shall confer, or arrange to confer, with a Judge of this court in chambers relative to a matter then pending before the Judge, he or she shall first give notice of the date and hour of the proposed conference to opposing counsel, or if counsel is unknown, to the opposing party, and shall satisfy the Judge that this has been done.

Adopted effective May 15, 1989.

Appendix E

4. **United States District Court Eastern District of Louisiana Pre-Trial Notice**

10. For each party, a list and description of exhibits intended to be introduced at the trial. Prior to the confection of the pre-trial order, the parties shall meet, exchange copies of all exhibits, and agree as to their authenticity and relevancy. As to any exhibits to which the parties cannot agree, memoranda shall be submitted on or before five working days prior to trial.

b. If a party considers he has good cause not to disclose exhibits to be used solely for the purpose of impeachment, he may ex parte request a conference with the Court and make his position known to the Court in camera.